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No. _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SUBURBAN O'HARE COMMISSION; THE VILLAGE OF ADDISON; THE VILLAGE OF BENSENVILLE; THE CITY OF DES PLAINES; THE VILLAGE OF ELK GROVE VILLAGE; THE CITY OF ELMHURST; THE VILLAGE OF FRANKLIN PARK; THE VILLAGE OF HARWOOD HEIGHTS; THE VILLAGE OF ITASCA; THE VILLAGE OF NILES; THE VILLAGE OF NORRIDGE; THE CITY OF PARK RIDGE; THE VILLAGE OF SCHILLER PARK; THE CITY OF WOOD DALE; and LAWRENCE C. BIENEMAN,

Petitioners,

v.

ELIZABETH HANFORD DOLE, Secretary of the Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION; RUSSELL A. OLSON, Regional Representative of the Department of Transportation, Region V; DONALD ENGEN, Administrator of the Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION; PAUL BOHR, Director, Great Lakes Region, Federal Aviation Administration; JOHN GUIDOTTI, Supervisor, Illinois Section, Chicago Airports District Office, Federal Aviation Administration; THE CITY OF CHICAGO, a municipal corporation; and JEROME R. BUTLER, Commissioner of the Department of Aviation of the City of Chicago,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. What are the standards and procedures to be applied by federal courts for addressing material issues of disputed fact relevant to the legality of challenged governmental action—be the challenged action that of the Congress, a state legislature, or a state or federal administrative agency?

2. Is there a difference between the procedures and standards for addressing material issues of disputed fact relevant to the legality of governmental action where the governmental action is challenged as violative of a constitutional prohibition against "arbitrary" government action (or any other constitutional limitation) and the standards and procedures for addressing material issues of disputed fact under the primary statutory frameworks developed by Congress over the last 80 years?

3. Is there a difference between the procedures for addressing material issues of disputed fact relevant to the legality of agency action under: A) the "substantial evidence" test; or, B) the "arbitrary and capricious test"?

4. In addressing material issues of fact relevant to the legality of agency adjudicatory action, when the jurisdictional statute states that judicial review shall be based on the substantial evidence test, can a Court of Appeals assume jurisdiction and review disputed fact issues under the substantial evidence test when there has been no trial and determination of the material issues of disputed fact before the agency?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs in the district court, and appellants in No. 85-1423, and petitioners in No. 85-1073, were: the Suburban O'Hare Commission; the Village of Addison; the Village of Bensenville; the City of Des Plaines; the Village of Elk Grove Village; the City of Elmhurst; the Village of Franklin Park; the Village of Harwood Heights; the Village of Itasca; the Village of Niles; the Village of Norridge; the City of Park Ridge; the Village of Schiller Park; the City of Wood Dale; and Lawrence C. Bieneman.

Defendants in the district court and appellees in No. 85-1423, and respondents in No. 85-1073 were: Elizabeth Hanford Dole, Secretary of the Department of Transportation; Russell A. Olson, Regional Representative of the Department of Transportation, Region V; Donald Engen, Administrator of the Federal Aviation Administration; Paul Bohr, Director, Great Lakes Region, Federal Aviation Administration; John Guidotti, Supervisor, Illinois Section, Chicago Airports District Office, Federal Aviation Administration; the City of Chicago, a municipal corporation; and Thomas Kapsalis, former Commissioner of the Department of Aviation of the City of Chicago. Jerome R. Butler, Commissioner of the Department of Aviation of the City of Chicago, was substituted for Thomas Kapsalis upon taking office. Additional respondents in No. 85-1073 were the United States Department of Transportation and the Federal Aviation Administration.

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SUBURBAN O'HARE COMMISSION; THE VILLAGE OF ADDISON; THE VILLAGE OF BENSENVILLE; THE CITY OF DES PLAINES; THE VILLAGE OF ELK GROVE VILLAGE; THE CITY OF ELMHURST; THE VILLAGE OF FRANKLIN PARK; THE VILLAGE OF HARWOOD HEIGHTS; THE VILLAGE OF ITASCA; THE VILLAGE OF NILES; THE VILLAGE OF NORRIDGE; THE CITY OF PARK RIDGE; THE VILLAGE OF SCHILLER PARK; THE CITY OF WOOD DALE; and LAWRENCE C. BIENEMAN,

Petitioners,

v.

ELIZABETH HANFORD DOLE, Secretary of the Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION; RUSSELL A. OLSON, Regional Representative of the Department of Transportation, Region V; DONALD ENGEN, Administrator of the Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION; PAUL BOHR, Director, Great Lakes Region, Federal Aviation Administration; JOHN GUIDOTTI, Supervisor, Illinois Section, Chicago Airports District Office, Federal Aviation Administration; THE CITY OF CHICAGO, a municipal corporation; and JEROME R. BUTLER, Commissioner of the Department of Aviation of the City of Chicago,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit in the above entitled causes, Nos. 85-1073 and 85-1423.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in No. 85-1073 was rendered on March 13, 1986. It is reprinted at page A-4 of the Appendix. The order of the United States Court of Appeals for the Seventh Circuit in 85-1073, denying rehearing *en banc* was rendered April 3, 1986. It is reprinted at page A-3 of the Appendix.

The opinion of the United States District Court for the Northern District of Illinois, *Suburban O'Hare Commission et al. v. Dole, et al.*, 603 F. Supp. 1013 (N.D. Ill. 1985), is reprinted at page A-31 of the Appendix. The order of the United States Court of Appeals for the Seventh Circuit in No. 85-1423, summarily affirming the District Court was rendered April 14, 1986. It is reprinted at page A-1 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals in 85-1073 was entered on March 13, 1986. A timely petition for rehearing and a suggestion for rehearing *en banc* was denied on April 3, 1986. The judgment of the Court of Appeals in 85-1423 was entered on April 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The relevant portions of the following pertinent statutes are set out verbatim in the Appendix: the Administrative Procedure Act, 5 U.S.C. Sections 554, 556, 557 and 706; the Administrative Orders Review Act, 28 U.S.C. Section 2347; the National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321-4361; the Federal Aviation Act, 49 U.S.C. 1486; and the Airport and Airway Improvement Act of 1982, 49 U.S.C. Sections 2202 and 2208.

STATEMENT OF THE CASE

A. THE FACTS

This case involves the Federal Aviation Administration's decision under the Airport and Airway Improvement Act of 1982 ("AAIA")[1] selecting an alternative to meet the long-term 20 year aircraft operations demand for commercial airport traffic in one of the nations major "hub" metropolitan areas—metropolitan Chicago. The FAA's decision had its genesis in the procedural decisionmaking framework created by a district court Consent Decree entered October 14, 1982 in *Illinois ex rel. Scott v. Butterfield*[2] and the AAIA.

1. The Butterfield Consent Decree

Under the FAA planning grant programs, cities like Chicago—which are called "hubs" in FAA parlance—are given planning grants to develop "Master Plans" which identify the airport facility needs of the hub to meet the 20-year long-term aviation operations demand for the area.

In addition to the Master Plan planning grants, the FAA has long had a construction grants program under the federal airport aid statute. This construction grants program has historically been based on individual construction projects

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[1] The current federal airport aid statute is called the Airport and Airway Improvement Act of 1982 ("AAIA"), 49 U.S.C. Section 2201 *et. seq.* (Chapter 31 of Title 49). Its immediate predecessor was the Airport and Airway Development Act of 1970 (P.L. 91-248). This legislation was in turn preceded by the Federal Airport Act of 1946 (P.L. 377). The AAIA and its predecessors are a completely separate category of legislation than the legislation creating the FAA regulatory role under the Federal Aviation Act of 1958, 49 U.S.C. 1301 *et. seq.)* (Chapter 20 of Title 49) and its predecessor, the Civil Aeronautics Act of 1938 (P.L. 75-706)

[2] No. 74 C 2410 in The United States District Court, Northern District of Illinois, Eastern Division. The Consent Decree is reproduced in the Appendix at A-109.

within an airport, e.g., a hanger, a terminal, or a runway. The danger of this isolated project-by-project grant decisionmaking is that it allows incremental expansion of air traffic without ever examining the long-term aviation needs of the area and the alternatives to meet those needs.

To stop this process at O'Hare, the State of Illinois and several of the petitioner suburbs brought suit in *Illinois v. Butterfield* to force the FAA to examine the long-term aviation operations demand for the Chicago area and the alternatives to meet that demand, and to select an alternative to meet that demand which did not involve ever increasing expansion of O'Hare.

In 1982, the State of Illinois and the plaintiff municipalities reached a settlement with the FAA and Chicago. Chicago and the FAA were allowed to proceed with Phase I construction of the Master Plan without litigation and without preparing an Environmental Impact Statement.

Rather than waiting for individual projects within Phase II to be submitted for isolated grant approval under the Airport and Airway Improvement Act of 1982, the FAA promised to make the decisions required under that Act, to follow the procedures required under that Act for the Master Plan projects *as a whole,* and to make those decisions *prior* to construction. Chicago, in turn, promised that it would not proceed with construction of Phase II until those procedures had been followed and the Master Plan decision had been made.

2. The Requirements of the Airport and Airway Improvement Act of 1982

As required by the Consent Decree framework, the FAA stated in the Final EIS that its decision to approve the Master Plan Project had to satisfy the following procedural and substantive requirements of the Airport and Airway Improvement Act of 1982. FAA Final EIS, p. 5. There are two key AAIA statutory obligations at issue here.

(a) Under Section 509(b)(5) of the AAIA, 49 U.S.C. Section 2208(b)(5), the Secretary of Transportation may not approve a project involving a "major" runway extension "unless the Secretary shall render a finding in writing . . . that no feasible and prudent alternative exists and that all reasonable steps have been taken to minimize such adverse effect."

(b) Under Section 509(b)(7)(A), 49 U.S.C. Section 2208(b)(7)(A), no project involving a "major" runway extension may be approved "unless the Governor of the State in which such project is to be located certifies in writing that there is a reasonable assurance that the project will be located, designed, constructed and erected so as to comply with applicable air and water quality standards." Under FAA regulations construction may not proceed in the absence of such certification.

3. The FAA's November 14, 1984 Substantive Decision on Alternatives

In the last ten years, the FAA has conducted two major studies addressing the alternatives available to accommodate increasing aircraft operations demand at the Nation's major "hub" metropolitan areas—including such major traffic centers as metropolitan Chicago, metropolitan Atlanta, New York and Los Angeles. In those studies, FAA expressly concluded: (a) that a new air carrier airport was necessary and was feasible for the metropolitan Chicago area; and (b) that major hubs such as Chicago could address existing and future traffic demand by shifting "transfer traffic" to other airports in other cities.

a. Establishment of New Major Public Airports in the United States (FAA 1977). In 1977, in response to a directive from Congress, the FAA conducted a major study of the 25 major airport hub cities to determine if any of the leading hubs needed a new airport and if a new airport was feasible.

Establishment of New Major Public Airports in the United States, FAA-ASP-77-3 (FAA August 1977). In that study the FAA concluded and reported to Congress that a major new airport was needed in Chicago to address existing traffic congestion at O'Hare and to meet future increases in demand, and that such an airport was both technically and economically feasible.

> . . . [R]elocations [i.e., new airport] appear *feasible* in terms of four airports (Atlanta, Chicago, Denver, Seattle). However, relocations are doubtful in Minneapolis, Philadelphia, St. Louis, and San Francisco and are clearly not feasible in Boston and New York.
>
> *Id.* at p.7-17 (emphasis added).

The report also emphasized the distinct environmental advantages of a new airport over older airports such as O'Hare. New airports can be developed with broad land buffers where the noise generated by aircraft can be absorbed either by vacant land buffer or by industrial, non-residential use of the land buffer. (*Id.* at 7-14.) By contrast, O'Hare has been developed from an old aircraft factory and WWII military field surrounded by preexisting residential communities: i.e., Park Ridge (established 1910), Elmhurst (established 1882), Bensenville (established 1884), DesPlaines (established 1925), etc. No land buffer was ever designed for O'Hare. For O'Hare the "buffer", i.e. the area of heaviest noise impact, is comprised of the residential communities which preexisted O'Hare.

b. Airfield and Airspace Capacity/Delay Policy Analysis (FAA December 1981). In 1981, the FAA conducted a second study to address the issue of increased demand and limited airport capacity at major hubs like Chicago and Atlanta, and proposed a number of solutions in addition to new airport construction. One solution was the diversion of existing and future incremental demand away from overtaxed hubs and use of other cities' airports where there was less congestion and

greater available supply. *Airfield and Airspace Capacity/ Delay Policy Analysis,* FAA-APO-81-14 (FAA December 1981). This alternative recognized that much of the traffic at most major hubs was independent of the particular hub and could use transfer points at other less congested hubs:

> . . . [M]any of the major congested airports serve as connecting points for domestic and international air carrier traffic. ORD [O'Hare], ATL, DEN, and JFK are prime examples. Less congested airports could serve a part of the connecting air carrier traffic now using congested hubs, thereby relieving congestion and reducing delay. . . . Active coordination of shifts in connecting traffic may also achieve diversion of air carrier traffic from congested hubs and provide better transportation with less capital expenditure.

Id. at pp. 117-118[3]

The FAA ignored these findings and these reports in deciding on how to meet long term aircraft operations demand in metropolitan Chicago.

c. The FAA's Rejection of Alternatives It Had Declared Feasible. On November 14, 1984, the Federal Aviation Administration issued a decision approving Chicago's FAA sponsored "Master Plan" for meeting the long-term (20-year) aircraft operations demand for metropolitan Chicago. (A-72). The FAA approved the alternative of a massive expansion of aircraft operations at O'Hare field, and rejected or ignored other alternatives which would not involve a massive increase in operations at O'Hare and which would have a less damaging effect on the residents of the communities surrounding O'Hare. The FAA approved the Master Plan to increase the air traffic load at O'Hare from the 1982 level of 591,000 flights per year to a 1995 level of 920,000 flights. It is undisputed that at a minimum, this increase in flight operations will result in 5000 more citizens being included in a noise zone which has been

[3] Approximately 50% of O'Hare's traffic never sets foot in metropolitan Chicago. This transfer traffic either originates or culminates in other locations and simply transfers at Chicago.

designated as having an unacceptable level of noise by the Department of Housing and Urban Development and the FAA. (See Affidavit of Dwight E. Bishop, par. 11, at A-267.)

In rejecting the alternatives of either a new airport or use of other cities' airports, the FAA never pointed to any evidence to support such rejection and never explained the contradiction between this rejection and FAA's own prior explicit findings that such alternatives were feasible. Instead, FAA asserted the following conclusions which are either not relevant to the alternative or are unsupported by any evidence:

(1) Utilization of other airports for transfer traffic. As to utilization of other airports in lieu of expanding traffic at O'Hare, the FAA "Record of Decision" stated:

> The Greater Rockford Airport and General Mitchell Field are too distant for most *Chicago area* travelers and are not suitable alternatives.
>
> FAA "Record of Decision", p. 4 (A-79)

This conclusion ignores the whole issue of "transfer traffic" air travelers who neither originate nor terminate in Chicago and who the FAA had previously found in its 1981 report could be accommodated by other cities' airports.[4]

(2) Development of a new airport. As to development of a new airport in lieu of expanding traffic at O'Hare the FAA stated:

> This alternative was not selected because of the difficulties in finding suitable sites, the extremely high costs of acquisition and development of a new site, and the long lead time to make it operational.
>
> FAA "Record of Decision", p. 4 (A-79).

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[4] See also the uncontested affidavits of Mr. Barry Bateman, Airport Director of Milwaukee County Airport (A-249), Robert Haveman (A-158), Joseph Carroll (A-198), and Richard deNeufville (A-238) on the issue of the feasibility of using other airports for transfer passengers.

At no time did FAA offer any evidence to support this conclusion or explain the contradiction between this claim and FAA's report to the Congress—which included detailed quantity and unit price information and site information—and which concluded that a new airport for the Chicago area was needed and feasible.[5]

B. PROCEEDINGS IN THE COURTS BELOW

Petitioners herein initially brought an action in the United States district court challenging the FAA's November 14, 1984 decision as to compliance with the AAIA, NEPA, and the Clean Air Act. Jurisdiction was predicated on 28 U.S.C. Section 1331, and relief was requested under the Administrative Procedure Act. *Suburban O'Hare Commission et al. v. Dole, et al.*, No. 84 C 10387 (filed December 4, 1984). At no time did plaintiffs charge any violations of the Federal Aviation Act.

1. The Jurisdictional Claim of Section 1486

Defendants FAA and Chicago moved to dismiss the district court complaint on the grounds that jurisdiction to review the FAA's decision (approving the Master Plan proposal to meet the 20-year metropolitan aircraft operations demand by expanding O'Hare and by rejecting other alternatives) is exclusively granted to the Court of Appeals under 49 U.S.C. Section 1486. That section provides for exclusive review of FAA decisions made under the Federal Aviation Act and states in pertinent part:

> (a) Any *order*, affirmative or negative, issued by the Board or Administrator *under this chapter* . . . shall be subject to review by the courts of appeals of the United States.
>
> * * *

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[5] No cost analysis or site analysis was cited by the FAA to support its conclusion that a new airport was not a feasible alternative. See Haveman affidavit, at par. 63, A-181-82.

(e) The findings of facts by the Board or Administrator, if supported by *substantial evidence,* shall be conclusive.

(Emphasis added.)

The "under this chapter" Issue. Petitioners argued that exclusive Court of Appeals jurisdiction over decisions of the FAA was limited to decisions made under the Federal Aviation Act, i.e, "under this chapter" (Chapter 20), and did not extend to FAA decisions made under statutes which were not "under this chapter"—e.g., the airport aid statute, the AAIA (Chapter 31). At the FAA's urging, at least two separate Courts of Appeals have held that jurisdiction over challenges to decisions made under the airport aid statutes are not within "this chapter" under Section 1486, and that subject matter jurisdiction is *not* properly in the Courts of Appeals. *Schwab v. Quesada,* 284 F.2d 140 (3rd Cir. 1960)[6]; *City of Dallas v. Rentzel,* 172 F.2d 122 (5th Cir. 1949); *Cf. Morris v. Helms,* 681 F.2d 1162, 1163 (9th Cir. 1982).

The "substantial evidence" limit on Court of Appeals jurisdiction under the 1914 FTC model jurisdictional grant. Petitioners also emphasized that Section 1486 limited its jurisdiction—not only to cases under this chapter—but also to those cases involving material issues of disputed facts where the

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[6] "Petitioner asserts as the jurisdictional basis for review of the Administrator's action, Section 1006 of the Federal Aviation Act, 49 U.S.C.A. Section 1486(a), which confers jurisdiction on the United States Courts of Appeals to review: 'any order, affirmative or negative, issued by the Board or Administrator *under this chapter* * * *.' (Emphasis supplied.) Under the quoted language the Administrator's act, to be reviewable, must be taken pursuant to a section of that chapter, i.e., Chapter 20 of Title 49 (The Federal Aviation Act). The action petitioner would have reviewed was taken under a different chapter, i.e., Chapter 14 of Title 49 (The Federal Airport Act). Since these chapters are separate and distinct, the provision for judicial review of the Administrator's actions in the Federal Aviation Act affords no support whatsoever for jurisdiction to review the Administrator's actions under the Federal Airport Act." 284 F.2d at 141 (emphasis in original).

substantial evidence test could be applied on review. Section 1486 and its "substantial evidence" review of material issues of disputed fact in the Court of Appeals has its origins in the Civil Aeronautics Act of 1938 which is in turn one of many statutes modeled after the Federal Trade Commission Act of 1914, 38 Stat. 719. The FTC statute created direct Court of Appeals review of agency decisions and directed the application of the "substantial evidence" test to disputed issues of material fact.

The FTC model approach of direct Court of Appeals review applying the substantial evidence test was predicated on the agency conducting a trial for the determination of the disputed issues of material fact. This was the identical pattern adopted by the Congress in the APA for application of the substantial evidence test. (see discussion below).

Since—despite petitioners request for a trial before the agency on material issues of disputed fact[7]—there had been no trial below, Petitioners asserted that it was impossible to apply the substantial evidence test to these material issues of disputed fact and for that additional reason, there was no basis for Section 1486 "substantial evidence" jurisdiction in the Court of Appeals.

2. The District Court Decision

The district court found that it did not have jurisdiction over the petitioners' claims under the AAIA and that such jurisdiction rested exclusively in the Court of Appeals under Section 1486. It therefore dismissed for want of jurisdiction. *Suburban O'Hare Commission v. Dole*, 603 F.Supp. 1013 (N.D. Ill. 1985) (A-31).

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[7] Petitioner Bieneman made a written request for an agency hearing under Sections 556-557 of the APA on material issues of disputed fact. The FAA denied the request.

The district court agreed that Section 1486 mandated application of the substantial evidence standard, and agreed that the substantial evidence test could not be applied to material issues of disputed fact relevant to the FAA's decision under the AAIA where there had been no agency trial below. However, the court concluded that it was appropriate to disregard the statutory command that the substantial evidence test be applied. In its stead the district court said that the "arbitrary and capricious" standard should be applied. The district court believed that the arbitrary and capricious standard and the substantial evidence test were the same standard and required the same procedures when applied to material issues of disputed fact. 603 F. Supp. at 1029, n. 20.

3. The Court of Appeals Decisions

Prior to the dismissal by the district court, as an exercise in protective jurisdiction, petitioners filed a timely challenge in the Court of Appeals within the 60 day time limit of Section 1486. Petitioners also filed a timely notice of appeal of the district court's decision dismissing for want of jurisdiction.

The Court of Appeals decided the Petitioners challenge to the FAA November 14, 1984 decision on March 13, 1986. (A-4) A petition for rehearing was denied April 3, 1986 (A-3), and the Court of Appeals subsequently affirmed the district court's decision on subject matter jurisdiction by summary order (A-1), relying on the Court's March 13, 1986 opinion.

Though reaching the same result, the Court of Appeals reasoning on jurisdiction and scope of review differed substantially from that of the district court:

a. The Court of Appeals decided that Section 1486 extended jurisdiction over challenges to the FAA's order under the AAIA, an order which was not entered under Chapter 20 (the statute to which 1486 applies), because at the same time the agency entered three

other orders which were entered under Chapter 20—orders which were not ever challenged.

b. The Court of Appeals took a contrary stance to the district court and to the opinions of other circuits—which had ignored the statutory command of section 1486—and held that the substantial evidence test should be applied as a standard of review. (Slip opinion, pp. 15-18, A-18-21.) The Court acknowledged that when used in the APA, the "substantial evidence" test could not be applied unless there had been an agency trial below. (Slip opinion, at p. 16, A-19.)

The Court proceeded to purport to apply the substantial evidence test to the material issues of disputed fact between the petitioners and the FAA—even though there had been no agency trial proceeding below. The Court necessarily assumed that the Section 1486 command to use "substantial evidence"—based on the FTC 1914 model—created a different framework of standards and procedures for addressing material issues of disputed fact than did the APA when it used the identical "substantial evidence" standard. As to use of other cities' airports for transfer traffic, the court took two positions:

a. The Court assumed that directing transfer traffic to other airports and capping O'Hare could not be done by either the City of Chicago or the FAA: ". . . [T]he City cannot direct the resulting overflow to any particular location." (Slip opinion, p. 21, A-24.) Not only did the Court ignore FAA's repeated acknowledgment that the airport proprietor can impose a limit on the number of operations,[8] but the Court also ignored the FAA's

[8] See *Noise Abatement Policy*, FAA-EQ-78-11 (FAA November 1976), at pp. 32-34; *Guidance Document On Airport Noise Control*, FAA-EE-80-37 FAA August 1980, at pp. 49, 54.

regulatory authority to impose limits on use of various airports for both economic and environmental purposes.[9]

b. The Court assumed that FAA had made a factual finding that a shift of transfer traffic was neither practical nor possible: "... [A] decision by the FAA that such a shift is not possible or practical is amply supported by the record". (Slip opinion p. 21, A-24.) Yet the FAA's finding on use of other airports is limited to use by Chicago area passengers—it makes no findings as to the feasibility of shifting transfer passenger traffic. The complete absence of a finding on this key alternative is glaring given the FAA's prior published admissions and the uncontested affidavits of petitioners' expert witnesses that such transfer was feasible.

As to the feasibility of a new airport, the Court made several factual observations seeming to lead to the unstated conclusion that a new airport was not feasible. (Slip opinion pp. 21-22, A-24-25.) The Court of Appeals cited no record evidence to support these claims and ignored FAA's express report to Congress that a new airport was both needed in Chicago and feasible.

The Court of Appeals did not base its affirmance of the rejection on the feasibility of a new airport—there is simply no record evidence to support any claim that this alternative is not feasible. Instead, the court seemed to reject a new airport because it was a "long-term" alternative whereas the problem being addressed by the O'Hare expansion program was a "short-term" problem:

> A new airport may or may not be the best *long-term* solution to the problems of airport travel in and out of

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[9] See, e.g., *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1318 (8th Cir. 1981); *City of Houston v. FAA*, 679 F.2d 1184, 1194-95 (5th Cir. 1982).

> Chicago, but the FAA and Chicago needed to formulate a plan to deal with the *short term* problems at O'Hare. The proposed development represents a reasonable response to those problems . . ."
>
> Slip opinion pp. 21-22, A-25

On the contrary, the whole purpose of the FAA funded "Master Plan" was to identify and select the "long-term" needs. This twenty year long-term project focus has been repeatedly acknowledged by the FAA and Chicago. According to Chicago and the FAA, the basic purpose of the Master Plan effort was to:

> . . . define and quantify the development of air carrier airport facilities to meet the *long-range future needs of the Chicago Metropolitan Area.*
>
> Master Plan, Volume XI, p. I-1 (emphasis added).

As to the AAIA Issues, the Court of Appeals acknowledged that the requirements of the AAIA applied to the O'Hare project. (Slip opinion p. 26, A-29). The Court further acknowledged that where a project involves a "major runway extension" the act imposes several requirements before the project may go forward. (See p. 5, *supra*)

The Court noted that "Runway 27R and 32L are, in fact, to be extended under Phase II of the project. The FAA contends that these are not "major" extensions for purposes of the Airport and Airway Improvement Act. FAA Order 5050.4 defines a major extension as one that will permit the accommodation of aircraft three decibels louder than those currently using the runway." (Slip opinion, p. 26, A-29.)

The Court then purported to address the evidence as to whether the proposed runway extensions were major—i.e. would allow aircraft operations three decibels louder. Nowhere

in the "Record of Decision" or the so-called "record" is there any discussion of the factual issue of whether aircraft emitting more than three decibels more noise will be using the new runway extensions at O'Hare. FAA's only evidence on this issue consists of an affidavit filed in the first instance before the Court of Appeals by FAA employee Michael Rose which states the conclusion—without supporting evidence—that the noise will only be one decibel louder. (A-294.) In contrast, Petitioners submitted a detailed affidavit by Mr. William C. Sperry, FAA and EPA's former top jet noise expert, [10] that the noise would be greater than three decibels, and attached the specific data drawn from FAA's own tables to show the noise levels greater than three decibels [11].

Instead of acknowledging that the affidavits of Rose and Sperry created a *genuine issue of material fact* to which some evidentiary procedure should apply, the Court treated as a *question of law* the issue of whether noisier aircraft—i.e., greater than three decibles—could use the runway. (Slip opinion, pp. 26-27, A-29-30), citing *Illinois Commerce Commission v. I.C.C.*, 749 F.2d 875, 880 (D.C.Cir. 1984). [12]

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[10] Mr. Sperry has served as Chief Aircraft Noise Control and Senior Technical Advisor on noise to the United States Environmental Protection Agency from 1973-1981. From 1967 to 1973 he served as the Chief of the Aircraft Noise Branch of the Office of Noise Abatement of the Federal Aviation Administration. (A-252.)

[11] Sperry's tables are drawn from both the official FAA regulation referenced in the FAA regulations (Table 1), and the official EPA publication referenced by Rose as the basis for estimating the noise from heavier aircraft of the same type. (Table 2) (A-300-01.)

[12] There is no agency finding of fact on this issue, and Rose's testimonial affidavit comes after the agency decision. Technically speaking, the substantial evidence test should not be applied to the Rose and Sperry affidavits since there was no trial below. More appropriately the issue of material fact should first be tried according to some trial procedure. 28 U.S.C. Section 2347 provides a model for just such a trial.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW ILLUSTRATES SERIOUS CONFUSION AND CONFLICT BETWEEN THE LOWER COURTS, THIS COURT, AND THE CONGRESS OVER THE STANDARDS AND PROCEDURES TO BE USED IN ADDRESSING GENUINE ISSUES OF MATERIAL *FACT* RELEVANT TO THE LEGALITY OF AGENCY ACTIONS BEING CHALLENGED

A. Questions of "fact" vs. Questions of "law"

The first year law student learns early that the world of law is divided into questions of "law" and questions of "fact". Where the issue is characterized as a question of "law", the general maxim is that questions of "law" can and should be decided anew—i.e. *de novo* by the courts at all levels of review.

Questions of "fact" have been treated differently than questions of law. A further distinction has been made between those controversies where the "facts" are not in dispute and those controversies where there are genuine issues of material fact.

B. The Central Question and the Current Problem

What are the procedures and standards to be applied when the relevant facts *are* in dispute? In particular, what are the standards and procedures to be applied when there are genuine issues of material fact as to the underlying facts relevant to the legality of governmental action—be that action is legislative or administrative—by the state or the federal government?

For reasons explained below, this question—which has a rather clear answer—has created consternation and confusion in the lower courts. Legal terms such as "substantial evidence" and "arbitrary and capricious"—which historically embodied easily understood and clear standards and procedures for those situations where there were material issues of fact relevant to

the legality of the governmental action—have now become confused by a plethora of unclear, inconsistent, and conflicting applications. The lower courts are applying these terms without regard to their historical and logical content and in disregard of the procedural frameworks mandated by Congress for addressing these material issues of disputed fact. Moreover, not the least of this confusion has been engendered by decisions of this Court which are both internally inconsistent and in conflict with the clear mandate of the Congress.

This confusion has also created a secondary problem of serious magnitude. Courts of Appeals and this Court are being increasingly asked to resolve controversies where the legality of the challenged action is based upon material issues of disputed fact which have not been tried and determined below—either in the agency or in the district court. Absent explicit procedures for remanding controversies for trial and resolution of the material issues of disputed fact—such as the procedures mandated by Congress in the Administrative Orders Review Act, 28 U.S.C. Section 2347 (b)—Courts of Appeal are functionally incapable of dealing as *nisi prius* courts to address unresolved disputed fact controversies. Moreover, as this Court has emphasized in *Vermont Yankee*, the Courts of Appeal are not authorized to send the material issues of disputed fact back to the agency for trial—where the agency has no statutory or constitutional requirement to conduct adversarial proceedings. As described below, this dilemma can be resolved simply by returning to the frameworks mandated by Congress for resolving material issues of disputed fact.

C. The Constitutional and Statutory Models for Addressing Underlying Material Issues of Disputed Fact Relevant to the Legality of Agency Action

What are the standards and procedures to be applied when there are genuine issues as to the underlying material facts

relevant to the legality of governmental action? At least through the first seventy years of this Century, the answer to the question was clear. The Constitution and the Congress provided five basic frameworks for addressing material issues of fact underlying challenged government action:

1. The Constitutional model for trial and determination of disputed issues of material fact underlying government action. Under this constitutional model—where there was no requirement that the governmental body whose action was being challenged provide a trial below—the material issues of disputed fact relevant to the question of whether the challenged action was "arbitrary and capricious" were tried and determined by the district court. Under the "arbitrary and capricious" standard, the person challenging the action had the burden of proof in the trial of disputed facts before the district court, but the challenger was entitled to a trial of disputed facts. As the Court stated in *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U.S. 194 (1934):

> Respondents invoke the presumption which attaches to the legislative action. But that is a *presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption.* . . . When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.
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> * * *
>
> *But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings.*
>
> 293 U.S. at 209-210 (emphasis added).

2. The Interstate Commerce Commission one-trial "substantial evidence" review of material issues of disputed fact. A one-trial "substantial evidence" model existed under the Urgent Deficiencies Act of 1913, 38 Stat. 220, with the appellate review of the agency trial findings conducted by a three judge district court under the "substantial evidence" test until replaced by an appellate court by the Administrative orders Review Act of 1950 (the Hobbs Act).

3. The Federal Trade Commission Act one-trial "substantial evidence" model. The Federal Trade Commission Act of 1914 model was premised on the recognition that under the ICC model, the trial of material issues of disputed fact had been provided by the agency, and that since there was no need for a second trial, review could begin in the Court of Appeals with review of the agency trial findings on disputed fact issues under the "substantial evidence" test.

4. The APA one-trial "substantial evidence" review of material issues of disputed fact. The one-trial constitutional legislative review model of *Borden's Farm,* the one-trial ICC substantial evidence model under the Urgent Deficiencies Act, and the one-trial FTC model were the models followed by the Congress in the passage of the APA for addressing material issues of disputed fact relevant to the legality of challenged agency action. Where there was a trial before the agency, the reviewing court, be it the district court or the Court of Appeals, served as an appellate tribunal as to fact issues, and treated the findings of the agency with deference under the substantial evidence test. Where, however, there was no trial and determination of disputed facts below, the district court tried and determined the disputed fact situation.

Congressman Walter, one principal architect of the APA, commented on the requirements of Section 554 regarding agency trials:

> The requirements of section 5 [554] are thus limited to cases in which statutes otherwise require a hearing be-

cause, where statutes do not require an agency hearing, the parties affected are entitled to try out the pertinent facts in court.

Legislative History of the Administrative Procedure Act, S.Doc. 248, 79th Cong. 2d Sess. (1946) (hereafter "Legis. Hist.") at p. 359.

The House Judiciary Committee similarly stated:

In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely on the record thereof, the facts pertinent to any relevant question of law must be tried and determined *de novo* by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and if Congress has not provided that an agency shall do so, then the record must be made in court.

H.Rpt. No. 1980, Legis. Hist. at p. 280.

Congress clearly wanted disputed issues of fact underlying agency action to be tried and determined somewhere. If the disputed facts are not tried and determined by the agency in an agency trial, then they must be tried and determined in the District Court.[13]

5. The Administrative Orders Review Act of 1950 (Hobbs Act) one-trial model. The Hobbs Act was the culmination of an effort by the Judicial Conference of the United States to consolidate judicial review in the Courts of Appeal. In several years of discussion, the Judicial Conference Committee repeatedly emphasized that disputed facts in such cases were to be tried in district courts and that Courts of Appeals were unsuitable.

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[13] The Senate Judiciary Committee also emphasized the need for a district court trial on disputed issues of fact where there had been no agency trial below. *See* Legis. Hist., at pp. 22 and 214.

> We concluded that there were certain types of orders made by the Commission, which could not be reviewed in the circuit courts of appeals on the record made before the Commission. Certain orders in emergency matters are made without any hearing. *Other orders, legislative or purely administrative in character are made upon informal hearings in no sense adversary in character. Such orders, your committee believes, can only be reviewed adequately upon a trial de novo in a nisi prius court. The circuit courts of appeals are not well equipped to conduct such trials.*
>
> > *1945 Report of the Judicial Conference Committee on Review of Orders of the Interstate Commerce Commission and Certain Other Administrative Orders, reprinted in: Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearings on H.R. 1468, H.R. 1470, and H.R. 2271, before Subcomm. Nos. 3 and 4, 80th Cong., 1st Sess., March 7, 11 and 24, 1947, and on H.R. 2915 and H.R. 2916 before Subcomm. No. 2 of the House Comm. on the Judiciary, 81st Cong. 1st Sess. 87, March 10 and April 1, 1949* (Hobbs Act Hearings), at p. 87 (emphasis added).

In explaining how the final draft of the Hobbs Act addressed those situations where there had been no agency trial below and there were material issues of disputed fact, Judge Phillips, Chairman of the Judicial Conference Committee which drafted the bill, explained the device of Section 7—now Section 2347—as follows:

> We used this sort of device, and you will find it in Section 7 of H.R. 1470. We provide that if the order was made up without a hearing, and, in fact, the hearing was required by law, the Court should remand the case and direct a hearing. That would be obvious of course.
>
> We further provide that if a hearing is not required by law and it is made to appear by the pleadings and affidavits filed by the parties that no genuine issue of material fact is involved and only questions of law are presented, so that

really no hearing on the facts was necessary, then the Court may review the law questions in that sort of case.

But if it appears that there were genuine issues of fact and no hearing was had, then the Court transfers the case to the United States district court for a trial in that court as if it had originally been instituted there.

Hobbs Act Hearings, *Id.*, at p. 28. (emphasis added).

D. The Meaning of "Substantial Evidence" and "Arbitrary and Capricious" and their Relationship to Material Issues of Disputed Fact Under the Five Constitutional and Statutory Frameworks

These five frameworks basically share an identical structure for addressing material issues of disputed fact and use the terms "substantial evidence" and "arbitrary and capricious" in a clear and consistent manner.

1. Agency Trial and the Substantial Evidence Standard. Where the governmental body whose decision is being challenged has provided a trial on the disputed issues, the reviewing court has applied the "substantial evidence" test to findings of the other governmental body as to disputed issues of material fact. Under these frameworks, the substantial evidence doctrine has developed a clear meaning and understanding, and several corollary requirements have been established. The law is clear that a reviewing court applying the substantial evidence test must examine both the evidence supporting the agency's factual claim and the evidence *contrary* to the agency's claim, and then determine based on this "whole record" whether reasonable men could reach the agency's finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

One of the key corollary requirements of the substantial evidence doctrine is that the agency must have provided a trial

on material issues of disputed fact before the "substantial evidence" test can be applied. This logical link between an agency trial on the material issues of disputed fact as a prerequisite to the application of the "substantial evidence" test on appellate review of the disputed fact issues is an essential element which has existed under all of these frameworks.

> *Review under the substantial evidence test is authorized only* when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U.S.C. § 553 (1964 ed., Supp. V), *or when the agency action is based on a public adjudicatory hearing.* See 5 U.S.C. §§ 556, 557 (1964 ed., Supp. V).
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> *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 414 (1971) (emphasis added).

2. The Situation Where No Agency Trial on Material Issues of Disputed Fact is Required. In contrast to the situation where the agency has provided an agency trial (hearing) on disputed issues of material fact—whether as a legal requirement or voluntarily—is the situation where the agency has no obligation to provide a trial prior to taking action: e.g., legislation, rulemaking or so-called "informal" adjudicatory action. Under these circumstances, there is no basis for application of the "substantial evidence" test—because there has been no trial of the material issues of fact. As each of these frameworks makes clear, when there has been no agency trial required on material issues of fact, the material issues of fact are tried and determined in the district court.

Just as the "substantial evidence" test has had clear historical and logical meaning which has been expressly limited to the situation where there has been an agency trial on disputed facts, the term "arbitrary and capricious" has also had a clear meaning. In contrast to the "substantial evidence" doctrine—which is limited to review of disputed questions of fact after an agency trial below—the arbitrary and capricious standard is much broader and encompasses both questions of

"law" and questions of "fact". The so-called "arbitrary and capricious" standard has constitutional roots and has covered at least three different situations:

a. When legislative or administrative action has been challenged as "arbitrary" (i.e. without basis in fact or without logical connection between the facts and the action)—and there *has been no* trial of the disputed fact issues by the governmental body whose action is challenged—the reviewing court has tried and determined the disputed fact issues. See, e.g., *Borden's Farm Products, supra.* In such circumstances, the substantial evidence standard has no role in the determination of whether the action was arbitrary.

b. When legislative or administrative action has been challenged as "arbitrary" (i.e. without basis in fact or without logical connection between the facts and the action)—and there *has been* a trial before the agency—the reviewing court has applied the substantial evidence test and has declared that a decision not based on substantial evidence would be arbitrary and capricious and therefore unconstitutional. See e.g., *Interstate Commerce Commission v. Louisville and Nashville R.R. Co.*, 227 U.S. 88 (1913).

c. When the legislative or administrative action has been challenged as "arbitrary" (i.e. without basis in fact or without logical connection between the facts and the action), and there were no disputed issues of material fact, the court would still examine whether there was a rational connection between the undisputed facts and the conclusion reached by the agency. See e.g., *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962).

In only one of these three situations does the standard of "substantial evidence" become involved with the standard of

"arbitrary and capricious". In that situation—where there has been a trial before the agency—the reviewing court is of course limited on review of disputed issues of fact to the substantial evidence test. Where, however, there has been no trial below, and material issues of disputed fact exist, each of the constitutional and statutory models cited above provides that the district court should hear and determine material issues of disputed fact with the burden of proof being on the person challenging the government action.

E. The Contradictions, Conflicts, and Anomalies Rampant among the Lower Courts in Addressing Material Issues of Fact Underlying Government Action Are Illustrated by the Decisions Below

The lower courts have lost sight of the basic constitutional and statutorily mandated standards and procedures for addressing material issues of disputed fact underlying government action. The lower courts are pulling pieces of the various frameworks out of context without adhering to the limits and requirements of these frameworks. The courts have been mixing up the requirements of the substantial evidence test with the separate requirements for addressing material issues of disputed fact where there has been no trial in the agency below.[14] For example, the lower courts here displayed a flagrant disregard for these limits:

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[14] A good deal of the lower court's confusion can be attributed to this Court's decision in *Overton Park*. While the Court correctly summarized the legal framework for applying the "substantial evidence" test, it incorrectly described the procedures for addressing material issues of disputed facts when there has been no required agency trial below. That portion of the decision conflicts with the Constitutional *Borden's Farm* model, the FTC model, the APA model, and the Administrative Orders Review Act model. As such, the *Overton* decision ignores the Constitution and the express mandate of the Congress, and conflicts with this Court's decision in *Vermont Yankee*.

1. The Court of Appeals applied the "substantial evidence" test to address material issues of disputed fact when there had been no agency trial below. This violated the express mandate of the APA framework and the clearly understood parallel framework of Section 1486. In applying the "substantial evidence" test to material issues of disputed fact in this case, the Court of Appeals attempted to honor the letter of the statutory command without honoring the corollary requirement that the substantial evidence test only be applied where there has been an agency trial below.

2. In its misguided attempt to apply the "substantial evidence" test, the Court of Appeals never examined or commented on the evidence contrary to the FAA's claims—including the FAA's own admissions that a new airport was feasible and that other cities' airports could be used for transfer traffic. The Court's action plainly violated the mandate of *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

3. The Court of Appeals assumed jurisdiction under a statute which limits its jurisdictional grant only to those cases in which the substantial evidence test can be applied—i.e., those cases in which material issues of disputed fact have been subjected to an agency hearing under Sections 556-557 of the APA. Absent such a hearing, the Court of Appeals had no jurisdiction.

4. The District Court assumed that the arbitrary and capricious standard and the substantial evidence test were identical, and therefore the reviewing court could apply the "arbitrary and capricious" test in the same manner as the "substantial evidence" test. In reality, where there has been no trial below, there is no basis for applying the substantial evidence test to material issues of disputed fact—whether the substantial evidence test is called by its own name or by the name "arbitrary and capricious". The proper procedure would

have been to remand the case for trial on disputed issues of material fact.[15]

5. In a further attempt to avoid the dilemma of where to try material issues of disputed fact, the District Court suggested that the Court of Appeals could always remand the material issues of disputed fact for trial before the agency. But such remand is premised on the assumption: a) that the agency can be ordered to conduct adversarial fact finding proceedings to resolve material issues of disputed fact; and, b) that the agency is the forum selected by Congress to try and determine such issues. The assumption is wrong on both counts. Where neither Congress nor the Constitution requires the agency to conduct adversarial trial proceedings to resolve material issues of disputed fact, the courts have no authority to require the agency to conduct such proceedings—either before or after the agency decision. See *Vermont Yankee, supra; Aircraft Owners and Pilots Association v. FAA*, 600 F.2d 965, 970 n.25

[15] The district court's confusion was based on the fact that many courts have declared that arbitrary and capricious and substantial evidence are the *same* standard. See e.g. *Pacific Legal Foundation v. Department of Transportation*, 593 F.2d 1338, 1343 n.35 (D.C.Cir. 1979); *Association of Data Processing v. Board of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984); *Associated Industries of New York v. Department of Labor*, 487 F.2d 342, 349-350 (2nd Cir. 1973). In contrast, other courts have stated that the arbitrary and capricious standard is more lenient than the substantial evidence standard. See *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 413, n.7 (1983); *Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1451 n.7 (D.C. Cir. 1985); *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985). In reality, both lines of cases are wrong. Arbitrary and capricious is "more lenient" to the agency simply because under the arbitrary and capricious standard the burden of proof is on the challenger. The "arbitrary and capricious" standard still requires that the challenger be given an opportunity to have the material issues of disputed fact tried and determined in court. In contrast, under "substantial evidence", the trial is before the agency and the agency has the burden of proof. *Steadman v. SEC*, 450 U.S. 1(1981).

(D.C.Cir. 1979). The second reason the courts could not remand to the agency for adversarial proceedings to resolve material issues of disputed fact is that Congress has assigned the function of trying and determining disputed facts to the district court where the agency has not conducted (and is not statutorily required to conduct) an adversarial trial on material issues of disputed fact. The courts must honor Congress' allocation of the fact finding function.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request this Court to issue a writ of certiorari to review the judgments and opinion of the United States Court of Appeals for the Seventh Circuit in Nos. 85-1073 and 85-1423.

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